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In the Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL, APPELLANT

v.

THEODORE B. OLSON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF UNITED STATES SENATE AS AMICUS CURIAE

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BRIEF OF UNITED STATES SENATE AS AMICUS CURIAE

This brief for the United States Senate as amicus curiae [1] in support of the constitutionality of the independent counsel law does not attempt to treat all of the questions raised by the court of appeals, but focuses instead on the central issues of judicial appointment and "good cause" removal. While discussions about appointment commonly precede those about removal, we have reversed that order for several reasons. The history of the removal provision demonstrates well, we believe, the concept of the office created by the independent counsel statute and contributes to an understanding of the nature of the appointment. Also, an understanding of the relation-

[1] The interest of amicus is set forth in 2 U.S.C. 288e(a), which provides that the Senate may direct its Legal Counsel to appear as amicus curiae in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." Permission to appear is "of right" and may be denied only for untimeliness. *Id.*, 288*l*(a). *See* S. Res. 281, 100th Cong., 1st Sess., 133 Cong. Rec. S11880-81 (daily ed. Sept. 9, 1987) (directing appearance in this case).

ship between the President or the Attorney General and an independent counsel may bear upon the question whether an independent counsel is an inferior officer under the Appointments Clause. We rely on the brief of the independent counsel to describe why she may be appointed as an inferior officer, but, to the extent that it is relevant whether an inferior officer is accountable to a head of a department, the removal provision demonstrates the accountability of independent counsel to Attorneys General.

SUMMARY

I. The Attorney General's authority to remove an independent counsel for cause preserves the President's ability to perform his constitutional responsibilities. Congress's consideration of special prosecutor legislation began during Watergate, which demonstrated that a statutory guarantee of independence was essential to an investigation free of unwarranted executive interference. All participants in the debate recognized the need to guarantee independence in investigating alleged wrongdoing by high officers of the executive branch. Against the need for independence Congress recognized the importance of respecting the executive's preeminent role in law enforcement. To balance independence and accountability Congress followed the guidance of the American Bar Association and the Department of Justice by providing for prosecutors to be removed by the Attorney General only for "extraordinary impropriety" or disability. 28 U.S.C. 596(a)(1) (Supp. V 1981). To accommodate constitutional concerns further, Congress subsequently lowered the standard for removal to "good cause," 28 U.S.C. 596(a)(1) (1982), to match other statutory provisions.

This Court has long recognized that executive officers' relation to the President depends on whether they assist in the performance of constitutional functions or perform statutory duties assigned by law. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838). The

First Congress's organization of the executive branch reflects these differences. Notably, district attorneys were not placed under even the Attorney General's supervision. Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92. Although Congress subsequently has centralized law enforcement in the Attorney General, that statutory development does not diminish Congress's ability to prescribe other arrangements for "carrying into Execution" criminal prosecutions. Art. I, sec. 8, cl. 18. This Court has established that the President's authority to remove executive officers also depends upon the nature of their duties. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935).

The provision for removal of independent counsel enables the executive branch to "accomplish[] its constitutionally assigned functions," *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977), including the duty of the President under the "Take Care" Clause "to see that the officer assigned by law performs his duty *faithfully* — that is, *honestly:* not with perfect correctness of judgment, but *honestly.*" 1 Op. Att'y Gen. 624, 626 (1823) (emphasis in original). The removal provision assures that an independent counsel "is ultimately accountable not only to the American people but to the President for serious misconduct in office." 122 Cong. Rec. 23054 (1976) (Sen. Percy).

By vesting removal authority in the Attorney General, the Congress has left it to the executive to construe and apply the provision in the first instance, and there is no warrant for resolving difficult interpretative issues in anticipation of the provision's use. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

II. Congress's determination to vest authority to appoint independent counsel in the Special Division of the court, upon application of the Attorney General, 28 U.S.C. 593(b), resulted from Congress's conclusion that a statutory system for independent counsel is necessary,

that temporary counsel are less intrusive than a permanent independent prosecutorial office, and that appointment by the courts is the best way of ensuring the impartiality central to the independent counsel concept.

The plain text of the Appointments Clause, Art. II, sec. 2, cl. 2, authorizes Congress to vest authority to appoint independent counsel "in the Courts of Law." The history of the evolution of the Clause at the Constitutional Convention provides no basis for the narrow reading of the Clause adopted by the court of appeals, but suggests to the contrary that the alternative appointment mechanism may have been annexed to the Clause in part to satisfy those Framers who favored granting the Congress meaningful discretion in delegating the responsibility for appointments.

In *Ex Parte Siebold*, 100 U.S. 371, 397-98 (1880), this Court squarely held that the Appointments Clause permits Congress to assign to the courts the duty to appoint executive officers unless judicial appointment would be "incongruous." The court of appeals erroneously disregarded *Siebold* because it misperceived the nature of the duties of the officers whose appointments were sustained there. The federal election supervisors in *Siebold* were not mere election observers, as the court of appeals believed, but were law enforcement officers charged with implementing the federal government's effort during Reconstruction to enforce voting rights in congressional elections under the Fifteenth Amendment. *Siebold*, therefore, provides strong support for judicial appointment of independent counsel. As in *Siebold*, appointment by the courts is not incongruous because appointment could not "with any greater propriety . . . have been assigned to any other depositary of official power." *Id.* at 398.

Nor does judicial appointment of independent counsel "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon*, 433 U.S. at 443. The appointment provision minimizes intrusion on the executive by focusing solely on cases where the executive has a conflict of interest and reserving to the Attorney General sole authority to identify those cases in which the law requires an appointment. The single task assigned to the courts is the selection of an impartial investigator once the Attorney General's action triggers the appointment.

ARGUMENT

I.

THE AUTHORITY TO REMOVE AN INDEPENDENT COUNSEL FOR CAUSE PRESERVES THE PRESIDENT'S ABILITY TO PERFORM HIS CONSTITUTIONAL RESPONSIBILITIES

The independent counsel law is grounded on the fundamental premise that a counsel's independence should be secured statutorily to the extent constitutionally permitted, while accountability should be assured, through the Attorney General's power to remove for good cause. After describing in part A the legislative history of the determination to assign to the Attorney General the power to remove for cause, we discuss in part B the constitutional predicates for the grant of independence and describe how the authority to remove for good cause preserves the President's ability to perform his constitutional responsibilities. In the concluding part, we suggest that the Court should construe the removal provision as necessary to avoid constitutional questions.

A. The Ethics Act Balances the Needs of Independence and Accountability

Congress began considering special prosecutor legislation in the wake of President Nixon's dismissal of Archibald Cox as Watergate special prosecutor. Attorney General Elliot Richardson had appointed Cox pursuant to regulations guaranteeing him "the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within

the jurisdiction of the Department of Justice." [2] The regulations provided that "[t]he Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions" and promised that "[t]he Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part." *Ibid.*

After Cox's dismissal, a divided Senate Committee on the Judiciary reported alternative bills to reestablish the office with strong statutory guarantees of independence. One measure, introduced by Senator Taft, vested appointment and removal in the Attorney General, but to prevent "unwarranted dismissal" permitted removal "only for neglect of duty, malfeasance in office or violation of this Act" and authorized judicial review of removals.[3] Acting Attorney General Bork advised that the bill "presents no constitutional difficulties that might cast doubt on the legitimacy of the Special Prosecutor's future actions." *Id.* at 25.

Congress determined not to enact special prosecutor legislation to deal with Watergate once Leon Jaworski had been appointed to succeed Cox as special prosecutor under renewed guarantees of independence.[4] Instead, Congress began considering the need for legislation establishing a procedure to be used whenever future circumstances warranted appointment of a special prosecutor. Congress had learned from the Watergate episode that independence for a special prosecutor could be assured only by statute, because a mere promise of independence by the executive is forever subject to rescission at the execu-

[2] 28 C.F.R. § 0.37 (1973), *reprinted in Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., Pt. 1, at 68 (1973) [hereinafter *1973 Senate Hearings*].

[3] S. Rep. No. 596, 93d Cong., 1st Sess. 18, 4 (1973) (reporting S. 2642, 93d Cong., 1st Sess. § 11(a) (1973)). The report explained that "the intent of this subsection is not to subject the Special Prosecutor to removal for marginal transgressions but calls for aggravated circumstances as cause for dismissal." *Id.* at 22.

[4] 28 C.F.R. § 0.37–38 (Nov. 2, 1973), *reprinted in 1973 Senate Hearings*, *supra* note 2, Pt. 1, at 261, 262.

tive's will. This need for a statutory guarantee of independence has remained the consistent assumption underlying Congress's consideration of special prosecutor legislation over the past fifteen years.

Balanced against the need for independence was Congress's concern to respect and accommodate the executive branch's preeminent role in law enforcement. Early on, Congress set aside a legislative proposal to "insulate[]" the conduct of law enforcement functions "from the direct political control of the executive branch" by transforming the Department of Justice into an independent agency.[5] Congress focused instead on measures to establish a special prosecutor to handle cases only where the normal prosecutorial apparatus was impaired by a pervasive conflict of interest.

The various proposals all included provisions to ensure the independence necessary for the special prosecutor to serve free from unwarranted interference. One proposal would have created a Public Attorney wholly independent of the executive and removable only by a special court for gross improprieties.[6] Another provided even greater independence by including no provision for removal before the expiration of a statutory term.[7] After a two-year study, in 1976 a special committee of the American Bar Association reported recommendations to Congress against the background of these proposals. The chairman of the Bar committee testified that "[t]he question of removal hinges on balancing the need for inde-

[5] S. 2803, 93d Cong., 1st Sess. § 1 (1973), *reprinted in Removing Politics From the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 249, 250 (1974) [hereinafter *1974 Senate Hearings*].

[6] *See Final Report of the Select Committee on Presidential Campaign Activities*, S. Rep. No. 981, 93d Cong., 2d Sess. 99–100 (1974).

[7] S. 495, 94th Cong., 1st Sess. (1975) (as introduced), *reprinted in Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess., Pt. 1, at 159 (1975) [hereinafter *1975 Senate Hearings*].

pendence and accountability." [8] Fearing that removal by the courts, in which the committee recommended that appointment power be vested, "might imply some degree of supervision by the court over the special prosecutor's activities, thus raising questions of prosecutorial discretion," *id.* at 360, the committee advised "that the power to remove must remain in the hands of the Attorney General." *Id.* at 366. However, the committee recognized that "[r]emoval by the Attorney General would contradict the purposes to be served by the appointment unless stringent qualifications were placed on the removal power." *Id.* at 365-66. Accordingly, it recommended that "the statute should provide that removal occur only after . . . 'extraordinary improprieties,'" *id.* at 366, "which would justify removal where appropriate but would not permit the Attorney General to remove a temporary special prosecutor without the fullest deliberation." *Id.* at 165.

The Senate Committee on Government Operations followed the ABA's guidance and reported legislation establishing a special prosecutor appointed by the Attorney General or the court, depending on the circumstances, but in either case removable only by the Attorney General for "extraordinary impropriety," the standard that Attorney General Richardson had initially promulgated in the Watergate regulations. S. Rep. No. 823, 94th Cong., 2d Sess. 45, 96 (1976) (reporting S. 495, § 595(d)(2)). President Ford and Attorney General Edward Levi proposed an alternative bill that vested appointment in the President with the advice and consent of the Senate, but sought to assure independence by providing that "[t]he grounds for removal of a Special Prosecutor should be, and to the maximum extent permitted by the Constitution shall be, limited to those which constitute extraordinary impropriety." 122 Cong. Rec. 23049 (1976). Senators Ribicoff and Percy forged a compromise, which the Senate passed 91-5, limiting the grounds for removal of the special prosecutor by the President to "extraordinary improprieties, malfeasance in office, or . . . any conduct constituting a felony." *Id.* at 23054. Senator Percy explained,

> The committee has lowered the standard for removal in an effort to insure that no special prosecutor would become a law unto himself. While independence from the President and the Attorney General would be absolutely necessary in the handling of the sensitive cases before him, the special prosecutor must always know that he is ultimately accountable not only to the American people but to the President for serious misconduct in office.

Ibid. Senator Percy emphasized, "What we are trying to get away from is dismissal just because he is too vigilant in exercising the responsibility that he holds. And there we must stand firm, there we want no loopholes." [9]

Statutorily mandated independence for a special prosecutor was finally achieved with the enactment of the Ethics in Government Act of 1978, Pub. L. No. 95-521, Title VI, 92 Stat. 1824, 1867-75. The Act provided that, within the delegated jurisdiction, the special prosecutor would have "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," excepting the Attorney General's wiretap authority. 28 U.S.C. 594(a). The prosecutor's independence was protected by limiting the Attorney General's grounds for removal to "extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such special prosecutor's duties." [10]

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[8] *1975 Senate Hearings, supra* note 7, Pt. 2, at 165 (ABA President-elect Spann).

[9] *Provision for Special Prosecutor: Hearings on H.R. 14476, H.R. 11357, H.R. 11999, H.R. 8281, H.R. 8039, H.R. 15634, and Title I of S. 495 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 17 (1976) [hereinafter *1976 House Hearings*]. The House took no action on the Senate bill.

[10] 28 U.S.C. 596(a)(1) (Supp. V 1981). The Act required any removal to be reported to Congress and the court and provided judicial review to determine whether the removal "was based on error of law or fact." *Id.*, 596(a)(2)-(3).

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The removal provision was designed "to balance the need for independence for a special prosecutor with the desire, for constitutional and other reasons, that the division of the court not be engaged in supervision of the special prosecutor." S. Rep. No. 170, 95th Cong., 1st Sess. 73 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4216, 4221. As the Senate Committee on Governmental Affairs explained,

> [A] certain degree of supervision is required and the Committee felt it appropriate that this supervision be conducted by the Attorney General, who is a member of the executive branch of the government. However, the special prosecutor was appointed in the first place because of a statutory finding that the Attorney General had a conflict of interest. Therefore, removal can only be accomplished if certain specified causes for removal exist.

Ibid. The Department of Justice agreed that, although "[o]rdinarily Congress may not impose limitations on the Executive's unfettered discretion to remove an Executive official," here "[t]he extraordinary circumstances inherent in the need for resort to a special prosecutor would also justify the restrictions placed on the Executive's power of removal in this instance." [11] On signing the

[11] *Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings on S. 555 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 16–17, 16 (1977) (Ass't Att'y Gen. Harmon). The initial House bill in the 95th Congress had provided for removal of special prosecutors by the court that had appointed them. H.R. 2835, 95th Cong., 1st Sess. (1977) (§ 596). The Department of Justice objected "that the vesting of the removal power in the courts would impose upon them a role inconsistent with their constitutional function. . . . [Removal power] inevitably implies some degree of con'rol or supervision over the Special Prosecutor's activities, a function which may not properly be vested in the courts." *Special Prosecutor Legislation: Hearing on H.R. 2835 and Related Bills Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 20 (1977) [hereinafter *1977 House Hearing*] (Ass't Att'y Gen. Harmon). The House Committee on the Judiciary subsequently reported a bill in accord with the Department's position on removal. H.R. Rep. No. 1307, 95th Cong., 2d Sess. 5 (1978).

Ethics Act into law, President Carter noted that the removal provision "gives the Special Prosecutor in the future, if needed, a great protection in carrying out his responsibilities without interference." 1978–2 Pub. Papers 1855.

Congress has reauthorized the independent counsel law twice since 1978, and both times Congress eased the provision for removal. In 1982, in response to criticism that the "extraordinary impropriety" standard was too stringent and "undefinable," S. Rep. No. 496, 97th Cong., 2d Sess. 17 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 3537, 3553, Congress altered the provision to permit the Attorney General to remove independent counsel "for good cause." Ethics in Government Act Amendments of 1982, Pub. L. No. 97–409, § 6(d), 96 Stat. 2039, 2042, 28 U.S.C. 596(a)(1). The Justice Department testified that a "good cause" standard "would make the special prosecutor no more independent than officers of the many so-called independent agencies in the executive branch and would, in all likelihood, insulate the legislation from constitutional attack in that respect." [12]

More recently, when the law was reauthorized in 1987, Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100–191, 101 Stat. 1293, Congress further altered the removal provision by changing the mechanism for judicial review in two ways. The Act had initially provided for the Special Division of the D.C. Circuit to review removals for "error of law or fact." [13] Congress transferred the jurisdiction to review removals to the district court and eliminated the special review standard. 101 Stat. 1305,

[12] *Ethics in Government Act Amendments of 1982: Hearing Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. 7 (1982) (Assoc. Att'y Gen. Giuliani).

[13] 28 U.S.C. 596(a)(3). The House Committee on the Judiciary had explained that the repealed standard gave "the court a greater degree of latitude in overturning a decision to remove a special prosecutor than it ordinarily has in reviewing other similar administrative decisions." H.R. Rep. No. 1307, *supra* note 11, at 11 n.27.

28 U.S.C. 596(a)(3). The transfer of review responded to objections "that it was inappropriate for the appointing authority to also sit in judgment of a dispute over removal." H.R. Rep. No. 316, 100th Cong., 1st Sess. 34 (1987). By transferring jurisdiction to the district court and eliminating the special standard, Congress attempted to make judicial review of an independent counsel's discharge identical to review of the dismissal of any other official with protected tenure.[14]

B. The Constitution Permits the Congress to Guarantee the Independence of Independent Counsel Subject to the Attorney General's Authority to Remove for Cause

One premise of the independent counsel law is that independent counsel must have "full power and independent authority," 28 U.S.C. 594(a), to investigate and prosecute matters within their jurisdiction. This guarantee, which the proponents of both executive and judicial appointment have understood to be essential, mirrors the proposal by President Ford and Attorney General Levi that a "Special Prosecutor shall not be subject to the direction or control of the Attorney General, except as to those matters which by statute specifically require the Attorney General's personal action, approval, or concur-

[14] H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 37 (1987). The court of appeals erred in reviewing the repealed judicial review provision, *see* J.S. App. 54a-56a, rather than the new provision, which took effect while these appeals were under submission before the court. Pub. L. No. 100-191, § 6(b)(2)(F), 101 Stat. 1307-08 (new removal provision applies to investigations pending on date of enactment, Dec. 15, 1987). The court disregarded the amendment in the apparent view that it is the provision that would have governed discharge, if counsel had been removed when she took the actions that underlie appellees' challenge, under which her constitutional status must be evaluated. J.S. App. 53a & n.41. However, it is "here-and-now subservience," *Bowsher* v. *Synar*, 106 S.Ct. 3181, 3186 (1986) (quoting *Synar* v. *United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986)), that motivates consideration of removability. Counsel's "here-and-now subservience" is framed by the only provision under which she may "here and now" be removed. *See* J.S. App. 99a-100a & n.15 (Ginsburg, J., dissenting).

rence." 122 Cong. Rec. 23049 (1976) (§ 593(b)). A second premise is that "no special prosecutor [sh]ould become a law unto himself." *Id.* at 23054 (Sen. Percy). In this part of our brief, we explain why the Congress, with the help of successive administrations, properly concluded that the removal provision in the independent counsel law constitutionally harmonizes the twin predicates of independence and accountability.

1. The Power of the Congress to Prescribe the President's Relation to Particular Executive Duties Depends Upon the Nature of the Duties

This Court has recognized since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), that executive officers perform a range of duties and that the President's right to control these duties varies depending upon their nature. Some officers serve as "the political or confidential agents of the executive, merely to execute the will of the president." *Id.* at 166. The Court stated,

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts.

Id. at 165-66. The Court contrasted such political duties with another category of executive duties: "[W]hen the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law." *Id.* at 166.

The nature of an officer's duty controls the officer's relationship to the President in its performance. Because officers performing political duties for the President "act by his authority," *ibid.*, the discharge of these duties "is

under the direction of the president." *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838). However, the Congress may also impose upon an officer statutory duties that "grow out of and are subject to the control of the law, and not to the direction of the president." *Ibid.* In distinguishing between political duties and duties assigned by statute, the Court in *Kendall* rejected the "alarming" proposition "that every officer in every branch of [the executive] department is under the exclusive direction of the president." *Ibid.* "Such a principle, we apprehend, is not, and certainly cannot be claimed by the president." *Ibid.*[15]

The President has greatest control over officers who assist him in "exercis[ing] . . . executive power in the constitutional sense." *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628 (1935). Chief among these functions are the Constitution's textual commitments to the President to "be Commander in Chief of the Army and Navy," Art. II, sec. 2, cl. 1, to negotiate treaties, Art. II, sec. 2, cl. 2, and to "receive Ambassadors and other public Ministers." Art. II, sec. 3. In fulfilling his constitutional role in national defense and foreign relations, the President "is accountable only to his country in his political character, and to his own conscience." *Marbury*, 5 U.S. at 166.[16]

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[15] The suggestion that the Court in *Marbury* and *Kendall* was describing only ministerial duties in which no discretion is exercised, *see* J.S. App. 26a n.21, is conclusively rebutted by *Butterworth* v. *United States ex rel. Hoe*, 112 U.S. 50 (1884), which addressed whether the Secretary of the Interior had power to revise patent determinations that Congress by law had committed to the judgment of a subordinate official. Rejecting the Attorney General's view, 17 Op. Att'y Gen. 205 (1881), the Court held that the Secretary had no power to control an exercise of administrative discretion confided by Congress in a subordinate officer. 112 U.S. at 66–68. The court of appeals misreads this Court's decisions when it equates the President's political powers with *all* "discretionary or policymaking functions." J.S. App. 26a n.21.

[16] *See United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (" 'The President is the constitutional representative of the United States with regard to foreign nations. . . . For his conduct he is responsible to the Constitution.' ") (quoting S. Doc. No. 231, 56th Cong., 2d Sess., Pt. 8, at 24); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) ("Congress cannot deprive the President of the command of the army and navy."); *Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863) (Constitution entrusts to President power to direct military action against belligerents).

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The establishment of the original departments of the executive branch by the First Congress, which "numbered among its leaders those who had been members of the [Constitutional] Convention," *Myers* v. *United States*, 272 U.S. 52, 136 (1926), reflects the early understanding of the President's constitutional prerogative to control officers responsible for these areas. When Congress established the Departments of Foreign Affairs and War, it charged each department's secretary to "perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States" and to "conduct the business of the said department in such manner, as the President of the United States shall from time to time order or instruct."[17] As Representative Vining explained, "The Departments of Foreign Affairs and War are peculiarly within the powers of the President, and he must be responsible for them." 1 Annals of Cong. 512 (J. Gales ed. 1789); *accord Marbury*, 5 U.S. at 166.

The First Congress's decisions regarding the organization of other executive duties reflect a different view of the President's relation to the officers who performed them. When Congress contemporaneously created the Department of the Treasury, it assigned the secretary specific statutory duties and omitted the open-ended requirement that the Treasury secretary perform duties at the direction of the President.[18] Madison explicated the constitutional principle that underlay the legislative difference among the departments. The secretaries of War and

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[17] Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50; Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29.

[18] Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65.

Foreign Relations were placed under the complete control of the President, because they "were merely to assist him in the performance of duties, which . . . he had an unquestionable right to do [himself] . . . if he were able." 1 Annals of Cong. 614. However, regarding responsibilities of the Treasury Department, such as the comptroller's duty to adjust and settle claims, Madison stated "that the nature of this office differed" and "question[ed] very much whether [the President] can or ought to have any interference." *Ibid.*

The original organization of the prosecutorial function reflects similarly that the First Congress did not equate the President's role in criminal prosecutions with that in war or diplomacy. Unlike the Departments of War, Foreign Affairs, and the Treasury, the First Congress established no department to conduct prosecutions. Instead, Congress created the Attorney General, whom it charged not with general responsibility to direct criminal prosecutions, but only with the "closely contained" [19] duties "to prosecute and conduct all suits *in the Supreme Court* in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments." [20] The Congress assigned the broader duty "to prosecute in [each judicial] district all delinquents for crimes and offences, cognizable under the authority of the United States," not to the Attorney General, but to an officer who "shall be appointed in each district . . . to act as attorney for the United States in such district." *Id.*, 1 Stat. 92. The Attorney General "was not placed in supervisory charge of the [district] attorneys of the United States," who were left "in full possession of cases involving the interests of the United States in the district courts." [21] Thus, the initial

[19] L. White, *The Federalists* 166 (1948).

[20] Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 93 (emphasis added).

[21] L. White, *supra* note 19, at 166. The first Attorney General pleaded for statutory authority over the federal government's litigation, Continued

structure devised for law enforcement reflects that neither the First Congress nor the President envisioned a necessary role for the President in supervising all criminal prosecutions.

Subsequent statutory development has established the Attorney General's contemporary unquestioned preeminence in law enforcement. Congress recognized in enacting the Ethics Act that "[t]he responsibility for law enforcement is placed upon the executive branch of the Federal Government," and "[t]he President and the Attorney General must have policy control to make discretionary enforcement decisions." S. Rep. No. 170, *supra* p. 10, at 5. Since 1861, when the Congress first authorized the Attorney General to supervise federal litigation by district attorneys,[22] the Attorney General has become "the hand of the President in taking care that the laws of the United States . . . in the prosecution of offences, be faithfully executed." *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922). But that mid-nineteenth century statutory development does not preclude other statutory prescriptions of the role of the Attorney General, as in the independent counsel law, in the exercise of Congress's authority "to make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, sec. 8, cl. 18. The

complaining that "the want of a fixed relation between the attorneys of the districts and the Attorney General, has rendered it impossible for me to take charge of matters on which I was not authorized to give instructions." Letter of Edmund Randolph to President Washington, Dec. 26, 1791, *reprinted in* 1 *American State Papers, Class X, Miscellaneous*, No. 25, at 46 (1834). Washington transmitted Randolph's letter to Congress, *id.* at 45, which failed to enact the legislation sought, *see* 3 Annals of Cong. 329–30 (1791) (proposal that Attorney General be authorized to give binding advice to district attorneys), "and it was . . . seventy [years] before the Attorney General was given supervision and control over the district attorneys." Key, *The Legal Work of the Federal Government*, 25 Va. L. Rev. 165, 176 (1938).

[22] Act of Aug. 2, 1861, ch. 37, 12 Stat. 285 (current version at 28 U.S.C. 519).

Attorney General's role in supervising criminal prosecutions "does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) (quoting *Myers*, 272 U.S. at 177 (Holmes, J., dissenting)).

2. The Statutory Grant of Independence May Be Effectuated By Forbidding Removal at Will

Making meaningful the statutory guarantee of independence that "is necessary for the Special Prosecutor to carry out a vigorous and thorough investigation" [23] requires a difference in tenure within the executive branch compared to that of an officer conducting typical prosecutions. This Court first considered the constitutional tie between duties and tenure in *Myers*, 272 U.S. 52. The Court recognized in *Myers* that "[t]he degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act," *id.* at 132, but it nevertheless held that this difference did not affect officers' amenability to discharge. The Court believed that "[t]he imperative reasons requiring an unrestricted power to remove the most important of [the President's] subordinates in their most important duties must . . . control the interpretation of the Constitution as to all appointed by him." *Id.* at 134.

However, "[t]he assumption was short-lived that the . . . President[] [has] inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties." *Wiener* v. *United States*, 357 U.S. 349, 352 (1958). Only nine years after *Myers* the Court unanimously repudiated the President's illimitable right of discharge and held that the nature of an officer's duties controls the officer's constitutional status within the executive branch. *Humphrey's Executor*, 295 U.S. 602. As in *Myers* the Court held in *Humphrey's*

[23] *1973 Senate Hearings*, *supra* note 2, Pt. 1, at 221 (Sen. Taft).

Executor that an officer who "exercises . . . executive power in the constitutional sense" and hence can "be characterized as an arm or an eye of the executive," *id.* at 628, is "inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." *Id.* at 627. But, for those officers who do *not* exercise "executive power in the constitutional sense," the Constitution does not mandate that the President have an unrestricted right of discharge in all cases.[24] The Court held that Congress's power to require officers to "act in discharge of their duties independently of executive control," which "cannot well be doubted," necessitates the ability "to forbid their removal except for cause." 295 U.S. at 629.[25] Limiting presidential removal is, in the Court's words, "an appropriate incident," 295 U.S. at 629, of Congress's power to subject nonpolitical of-

[24] *Humphrey's Executor* cannot be limited to adjudicatory duties. The Court understood that the FTC was responsible for "filling in and administering the details" of the law prohibiting "unfair methods of competition," 295 U.S. at 628, which is an executive, not an adjudicatory, task. Further, as the Court recognized, the FTC had power to initiate cases by "issu[ing] a complaint stating its charges," *id.* at 620, a power much closer to prosecution than adjudication. Although the Court said that the FTC "acts in part quasi-legislatively and in part quasi-judicially," *id.* at 628, the FTC's enforcement powers are "in fact 'executive.'" *Bowsher*, 106 S.Ct. at 3207 n.3 (White, J., dissenting). Independent agencies "share, much as cabinet officers share, in the power granted by Article II to execute the laws." Brief for the Attorney General as Appellee and for the United States as *Amicus Curiae* at 121 n.78, *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

[25] In *Myers* the Court had stated that the President's need to "discharge his own constitutional duty of seeing that the laws be faithfully executed" conferred upon him the power to discharge any officer who he believed had not "intelligently or wisely exercised" his discretion, even an officer who performed duties "specifically committed to [his] discretion" or "of a quasi-judicial character . . ., the discharge of which the President can not in a particular case properly influence or control." 272 U.S. at 135. In *Humphrey's Executor* the Court abandoned this view that limiting removal of such officers to cause "would make it impossible for the President . . . to take care that the laws be faithfully executed." *Id.* at 164.

ficers "to the control of the law, and not to the direction of the president," *Kendall*, 37 U.S. at 610, "[f]or it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." 295 U.S. at 629.

3. The Power to Remove Independent Counsel for Good Cause Enables the Executive Branch to Accomplish Its Constitutionally Assigned Functions

The statutory restriction on dismissal of independent counsel is "at the heart of the statutory mechanisms protecting the independent counsel's ability to act independently of the President's direct control." H.R. Conf. Rep. 452, *supra* note 14, at 37. However, this provision also ensures accountability by enabling the President, through "the personal action of the Attorney General," to remove an independent counsel "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. 596(a).[26]

[26] Congress vested removal authority in the Attorney General rather than the courts to ensure "that the division of the court not be engaged in supervision of the special prosecutor." S. Rep. No. 170, *supra* p. 10, at 73. The court of appeals' attempt, J.S. App. 54a–56a, 82a–83a, to construe the Act as empowering the court to supervise counsel, through either the authority to terminate the office "on its own motion or upon suggestion of the Attorney General," 28 U.S.C. 596(b)(2), or review of counsel's discharge by the Attorney General, *id.*, 596(a)(3), is flatly contrary to Congress's expressed intent. Congress stated plainly that the court's authority to terminate an office was designed to address "the state of the investigation . . . and not the conduct of the special prosecutor" and "should not be interpreted as a substitute for remov[al]." S. Rep. No. 170, *supra* p. 10, at 75. Similarly, judicial review of discharge does not alter the fact that "it is only the authority that can remove" counsel — the Attorney General — "that [s]he must fear." *Bowsher*, 106 S.Ct. at 3188 (quoting *Synar*, 626 F. Supp. at 1401). FTC Commissioner Humphrey's successful challenge of his removal by President Roosevelt does not mean that this Court supervises the FTC.

The removal provision is intended to parallel the standard upheld in *Humphrey's Executor*, under which independent agency officials may be removed "for inefficiency, neglect of duty, or malfeasance in office," [27] and to incorporate case law on removal.[28] There can be no doubt, accordingly, that the provision bars Attorneys General from replacing independent counsel only because they want "their men," *Wiener*, 357 U.S. at 354, and requires Attorneys General to exclude from a removal decision "causes unconnected with the proper administration of the office." *Shurtleff* v. *United States*, 189 U.S. 311, 318 (1903).

The provision provides the President with full means to ensure that independent counsel "faithfully" performs her duties in executing the law. As Attorney General William Wirt explained, under the "Take Care" Clause "[the President is] to see that the officer assigned by law performs his duty *faithfully* — that is, *honestly*: not with perfect correctness of judgment, but *honestly*." [29] Thus,

[27] *E.g.*, 15 U.S.C. 41 (FTC); 49 U.S.C. 1030(c) (ICC). Other statutes simply mandate removal "for cause," *e.g.*, 12 U.S.C. 242 (Federal Reserve Board); 39 U.S.C. 202(a) (U.S. Postal Service), or silently imply a for-cause limitation, as in *Wiener*, *e.g.*, 2 U.S.C. 437c(2)(A) (FEC); 15 U.S.C. 78d (SEC); 47 U.S.C. 154 (FCC). These various statutory formulations have all been understood to impose an equivalent standard for removal.

[28] *See* Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, *Special Prosecutor Provisions of Ethics in Government Act of 1978*, at 54 (Comm. Print 1981). When Congress reauthorized the independent counsel law last year, it reaffirmed its intent that the removal provision match similar statutory provisions. H.R. Conf. Rep. No. 452, *supra* note 14, at 36–37.

[29] 1 Op. Att'y Gen. 624, 626 (1823) (emphasis in original). Wirt gave the example of a statute conferring appointment authority upon the Postmaster General: "If the postmaster shall appoint one applicant while the President prefers another, *the President cannot interfere with the appointment*; because the selection is referred by law to the judgment of the postmaster alone, without any reference to any controlling power in the President." *Ibid.* (emphasis added). Wirt stated that the "Take Care" Clause would permit the President to interfere

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the Clause guarantees the President only "a minimum removal power" to ensure that the "legally designated enforcers act *diligently* and *honestly*; yet even in this case Congress is probably entitled to prescribe a fair procedure for the determination of such questions." [30] By providing authority to discharge independent counsel who are not honest, efficient, and able, Congress has respected the President's constitutional responsibility under the "Take Care" Clause.

Further, although the issue need not be resolved here, the authority to discharge counsel for "good cause" effectuates the President's constitutionally committed functions in war and foreign relations. If the President ever determines that an independent counsel is unacceptably harming the nation's foreign relations or national security, the Act authorizes him in the discharge of his constitutional functions to remove counsel for "good cause." In such circumstances, judicial review of removal would necessarily be circumscribed, for " '[a]s to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.' " [31] Moreover, there is no indication in the text or history of the independent counsel law that the Congress intended to vest in independent counsel or in a reviewing court the power to disregard a presidential determination based on

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only if "the postmaster should make a *corrupt* appointment," because "the laws in such a case have not been faithfully executed" by the postmaster, and the President accordingly "has power to remove him." *Ibid.* (emphasis added).

[30] E. Corwin, *Presidential Power and the Constitution* 111 (1976) (emphasis in original).

[31] *Department of the Navy* v. *Egan*, No. 86-1552, slip op. at 11 (U.S. Feb. 23, 1988) (quoting *United States* v. *Nixon*, 418 U.S. 683, 710 (1974)). Review would need to be searching enough to assure that an assertion of a national security basis for removal was not a pretext to derail a legitimate investigation. *See, e.g.*, S. Rep. No. 981, *supra* note 6, at 37–40 (White House's misuse of CIA to restrict Watergate investigation).

his constitutional authority in military or national security affairs.

Thus, the removal provision does not "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977). The Attorney General, who triggers the appointment of independent counsel by determining that there are reasonable grounds to investigate further and who establishes "the markers," J.S. App. 96a (Ginsburg, J., dissenting), for the investigation's jurisdiction, has the power through removal to assure, in Senator Percy's words, that an independent counsel does not "become a law unto himself" and remains "accountable not only to the American people but to the President for serious misconduct in office." 122 Cong. Rec. 23054 (1976).

Neither does the restriction on removal impose any "potential for disruption" of the executive branch beyond that "justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon*, 433 U.S. at 443. Congress enacted the limitation based on its reasonable conclusion that, for an executive officer with no protected tenure to investigate and prosecute high-ranking executive officials, " '[t]he pressures, the divided loyalty are too much for any man.' " S. Rep. No. 170, *supra* p. 10, at 5 (quoting Archibald Cox). As Madison stated,

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Federalist No. 51, at 356 (B. Wright ed. 1961). The severe conflict-of-interest problems that attend efforts by the executive branch to enforce adherence of its own highest-ranking officers to the criminal law dictate use of

the "auxiliary precaution" of tenure protection to "oblige [the government] to control itself." Congress's "overriding need to promote," *Nixon*, 433 U.S. at 443, the even-handed administration of justice by overcoming obvious conflicts of interest justifies the minimal intrusion of the limitation on removal.

C. The Court Should Construe the Removal Provision as Necessary to Avoid Constitutional Questions

The legislative history of the removal provision establishes the central meaning of the "good cause" restriction, but leaves a number of questions of potential application intentionally unresolved. The fundamental purpose of the removal provision is "to get away from . . . dismissal just because [an independent counsel] is too vigilant in exercising the responsibility that he holds." *1976 House Hearings*, *supra* note 9, at 17 (Sen. Percy). At first, Congress prescribed a high degree of cause by legislating a standard of "extraordinary improprieties," but, at the recommendation of the Department of Justice in 1981, the standard was amended to "good cause." *See* page 11 *supra*. Nevertheless, the Congress continued to exhort the Attorney General to remove "in only extreme, necessary cases, as removal of a special prosecutor could severely undermine the public confidence in investigations of wrongdoing by public officials." S. Rep. No. 496, *supra* p. 11, at 17. The conference committee on the 1987 reauthorization expressed its understanding that an Attorney General would lack "good cause" to dismiss independent counsel who resist directives that would "violate the integrity of their proceedings." H.R. Conf. Rep. No. 452, *supra* note 14, at 37.

But beyond that central conception of "good cause," the Congress has not sought to resolve in the text of the statute how the standard should be applied in particular cases. As discussed above, Congress drafted the removal provision to parallel similar provisions that the Court has sustained and modified the provision to satisfy expressed concerns to ensure that the provision meets constitutional muster. *See* pages 11-12 *supra*. These efforts highlight Congress's intent to limit the Attorney General's ability to discharge independent counsel only insofar as is consistent with the President's constitutional prerogatives. To the extent that any potential application of the removal provision could create an unavoidable constitutional question, on this facial challenge to the unused removal power the Court should fulfill its "duty to adopt that construction which will save the statute from constitutional infirmity." [32]

The Congress has vested in the Attorney General the first opportunity to construe the provision and to apply it to particular circumstances.[33] It may be that an Attorney General will remove an independent counsel for misconduct that raises no interpretative questions about "good cause." Only if a dispute arises about the reach of the removal provision and judicial review is sought will the Court need to resolve questions about the precise scope of the removal power.[34]

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[32] *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)).

[33] The power of the Attorney General to construe and implement the removal provision contributes to the "enormous difference . . . insofar as impact upon the balance of powers" between vesting the power to remove for cause in an appointee of the President and "eliminat[ing] *all* presidential power of removal." *Synar*, 626 F. Supp. at 1401 (emphasis in original).

[34] For example, "a *serious* departure from the Department of Justice's policies" could constitute good cause for dismissal, *Amendment of the Special Prosecutor Provisions of Title 28: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 17 (1982) (Assoc. Att'y Gen. Giuliani) (emphasis added), but *every* failure to follow Department policies would *not* constitute good cause. *See* S. Rep. No. 496, *supra* p. 11, at 16 (responding to earlier Department of Justice description of removal power).

Another potential dispute would be whether the Attorney General has power to dismiss for good cause for refusal to follow every presi-

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II.

THE ACT CONSTITUTIONALLY VESTS THE AUTHORITY TO APPOINT INDEPENDENT COUNSEL IN THE COURT

In order to assure an "impartial appointment," H.R. Rep. No. 1307, *supra* note 11, at 4, of independent counsel, and in accord with "the fundamental principle that no man can be a prosecutor or judge in his own case," S. Rep. No. 170, *supra* p. 10, at 5, the Congress provided for the appointment of counsel by a court under the authority of the Appointments Clause. In part A of this section we describe the legislative history of Congress's determination that no other means of appointment could as well serve the objectives of the law. In part B we explain Congress's justifiable reliance on the text of the Appointments Clause, and on this Court's prior construction of it in *Ex Parte Siebold*, in exercising the Congress's constitutional authority by law to delegate this limited but critical responsibility to the court.

A. Congress Determined That Court Appointment of Independent Counsel Is Necessary to Achieve the Purposes of the Act

Three basic issues framed the debate over legislation to appoint a special prosecutor: first, whether there should be a general legislative solution or reliance on ad hoc efforts each time a conflict of interest threatens to undermine public confidence in an investigation of alleged criminal conduct within the executive branch; second, if a statutory solution was needed, whether Congress should

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dential direction. *Compare Oversight of the Independent Counsel Statute: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 430 (1987) (Ass't Att'y Gen. Bolton) ("prosecutor must comply with the President's direction of his discretion [to grant immunity] on pain of dismissal") *with* H.R. Conf. Rep. No. 452, *supra* note 14, at 37 (resisting "orders to grant unwarranted prosecutorial immunity to the targets of the independent counsel's criminal investigation" not good cause for removal).

establish a permanently staffed office or an office to be filled only when future events triggered the need; and third, how should either a permanent or a temporary special prosecutor be appointed.

Congress decided from the outset that a long-term statutory solution was necessary. The Senate Watergate Committee warned against "wait[ing] until another national crisis to re-institute the Office of Special Prosecutor. It is far better to create a permanent institution now than to consider its wisdom at some future time when emotions may be high and unknown political factors at play." S. Rep. No. 981, *supra* note 6, at 96-97. The special ABA committee agreed that "[t]he issue is not whether a special prosecutor is needed, but rather how, under what circumstances, under what authority, and at what time a special prosecutor should be activated." *1975 Senate Hearings, supra* note 7, Pt. 2, at 360. Examining Teapot Dome and Watergate, the committee concluded that "[h]istory should have taught us that the existing system permits situations to develop, extreme situations which mandate the ad hoc appointment of a special prosecutor long after one should have been appointed." *Ibid.*

In the case of Teapot Dome, special counsel were appointed only after years of public allegations and congressional investigation, a change in administration upon President Harding's death, and enactment of a special statute.[35] During the tax corruption scandal of the Truman Administration, Attorney General J. Howard McGrath appointed Newbold Morris as a special assistant to investigate executive branch corruption. Wash. Post, Feb. 2, 1952, at 1. However, Morris was charged only to

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[35] Act of Feb. 8, 1924, ch. 16, 43 Stat. 5. Even then, the criminal prosecutions that eventually occurred were only one product of Congress's purpose in enacting a statute to require the government to initiate civil litigation to cancel the corruptly obtained oil leases. Act of Feb. 27, 1924, ch. 42, 43 Stat. 16; *see Pan American Petroleum & Transport Co.* v. *United States*, 273 U.S. 456, 491-92 (1927).

investigate and to recommend, not to prosecute.[36] Further, notwithstanding a promise of complete independence, Morris was fired by McGrath two months into his investigation for submitting financial questionnaires to Department of Justice officials and insisting on access to Department of Justice files. Wash. Post, Apr. 4, 1952, at 1. President Truman then fired McGrath, *ibid.*, but no new special investigator was appointed.[37]

Finally, the appointment of a special prosecutor in Watergate resulted largely from the coincident timing of Elliot Richardson's confirmation hearings as Attorney General, at which Richardson agreed to appoint a special prosecutor.[38] Richardson promised that he would resign as Attorney General if he were directed to discharge the special prosecutor "in the absence of some overwhelming evidence of cause." *Id.* at 72. After Richardson was so directed, he and his deputy did resign rather than carry out the President's order. The special prosecutor was then fired, and after a nationwide storm of protest a new prosecutor was appointed. Based on this tumultuous history of ad hoc approaches to investigations of executive

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[36] N. Morris, *Let the Chips Fall* 8 (1955) (reprinting letter of appointment).

[37] Congress's efforts to legislate terms of the investigation were not successful. Legislation was introduced at President Truman's request to grant Morris subpoena and immunization powers. 98 Cong. Rec. 975, 988, 1020, 1105, 1175 (1952). Wary of immunity and of an investigator appointed by the Attorney General, the judiciary committees of both Houses rejected the requests and reported substitute legislation to authorize a new special investigator with subpoena power to be appointed by the President with Senate confirmation. S. Rep. No. 1339, 82d Cong., 2d Sess. (1952); H.J. Res. 410, 82d Cong., 2d Sess. (1952). The Senate agreed to the substitute measure on July 3, after Morris had been fired, but the House did not act on it. 98 Cong. Rec. 9055 (1952). Congress's failure to enact a legislative charter for the investigation illustrates the difficulty faced by ad hoc legislative attempts to deal with a particular investigation.

[38] *Nomination of Elliot L. Richardson To Be Attorney General: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 4 (1973).

branch wrongdoing, Congress determined that a statutory system was necessary.

Attention initially focused on establishing a permanent office to investigate and prosecute as matters arose. The Senate Watergate Committee recommended an office of Public Attorney, headed by an officer with a five-year term, to handle all criminal cases in which the executive branch had a conflict. S. Rep. No. 981, *supra* note 6, at 96-97. Many commentators questioned, however, the wisdom of a permanently staffed office, objecting that the most able prosecutors would not accept an appointment under which they might never receive an assignment and that a permanent office would pose too great a risk of abuse and unnecessary interference with the Department of Justice.[39] The ABA committee recommended against a permanent office based on these concerns and proposed a statute "which would require the Attorney General to consider appointing a special prosecutor in accordance with statutory guidelines." *Id.*, Pt. 2, at 362. The House of Representatives shared the "concern about insuring adequate accountability for a permanent special prosecutor." H.R. Rep. No. 1307, *supra* note 11, at 3-4. Accordingly, the Ninety-fifth Congress turned away from a permanent office and focused on "a mechanism for the appointment of an independent special prosecutor on a temporary and ad hoc basis. Such a mechanism would be available when needed, avoiding both the necessity to trust to luck and the drawbacks of a permanent special prosecutor." *Id.* at 4.

The primary unsettled issue was how to appoint a temporary special prosecutor. Authority to appoint a permanent prosecutor could have been vested in the President with the Senate's advice and consent. On a case-by-case

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[39] *See, e.g., 1974 Senate Hearings*, *supra* note 5, at 121 (Prof. Burke Marshall); *id.* at 201 (Spec. Pros'r Archibald Cox); *1975 Senate Hearings*, *supra* note 7, Pt. 1, at 104 (Spec. Pros'r Leon Jaworski); *id.* at 120-21 (Spec. Pros'r Henry Ruth); *id.* at 238-39 (Erwin Griswold); *id.* at 262 (Philip Lacovara).

basis, however, presidential appointment with confirmation would likely be too protracted and partisan to accomplish the purpose intended by the statute and would preclude confidential investigations of nonpublic allegations. Accordingly, the two appointment methods that were considered most extensively were appointment by the Attorney General, or by a court, upon the Attorney General's application.

The constitutionality of vesting appointment authority in the courts was the subject of extended scholarly debate. Some participants, including Senator Baker and Attorney General Levi, believed court appointment raised constitutional questions;[40] others, such as Professors Paul Freund and Paul Bator, endorsed judicial appointment based on the text of the Appointments Clause, Art. II, sec. 2, cl. 2, and this Court's construction of the Clause in *Ex Parte Siebold*, 100 U.S. 371 (1880).[41] The ABA committee reported that its "research and discussion have convinced all its members that who appoints a special prosecutor is a question of policy for Congress to decide. The Committee concludes that the Constitution and case law thereunder authorizes court appointment of a special prosecutor." [42]

The ultimate enactment of judicial appointment resulted from a critical evolution in the thinking of the Department of Justice. In 1977, for the first time the Justice De-

[40] *1975 Senate Hearings*, *supra* note 7, Pt. 1, at 23 (Baker); *1976 House Hearings*, *supra* note 9, at 34 (Levi).

[41] *See, e.g., 1973 Senate Hearings*, *supra* note 2, Pt. 1, at 365 (Freund) (terming court appointment "a question of unusual clarity in its resolution because of the special language of article II"); *id.*, Pt. 2, at 557–64 (Prof. Stephen Breyer & Philip Heymann); *Special Prosecutor and Watergate Grand Jury Legislation: Hearings on H.J. Res. 784 & H.R. 10937 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 334 (1973) (Bator); *id.* at 205–08 (Prof. Gerhard Casper); *id.* at 215 (Prof. Paul Mishkin).

[42] *1975 Senate Hearings*, *supra* note 7, Pt. 2, at 361. The committee proposed appointment by the Attorney General or, if he failed to act, by a special court of three retired circuit judges. *Id.* at 362–63.

partment endorsed the constitutionality of court appointments.[43] Although it adhered to its historical view that under the separation of powers the Appointments Clause "would generally require that the Executive be allowed to appoint those officials carrying out Executive functions," the Justice Department told Congress that court appointment was constitutionally "justified by . . . the extraordinary circumstances which would mandate recourse to a special prosecutor." *Id.* at 21, 20. Pointing to "the circumstances surrounding misconduct by high-level officials and the need to preserve the appearance as well as the substance of justice," the Department concluded based on *Siebold* that "[i]n such exceptional circumstances we do not believe that an 'incongruous' duty would be imposed upon the courts." *Id.* at 21.

After years of careful study, Congress vested authority to appoint independent counsel in the Special Division of the court, upon application of the Attorney General only, 28 U.S.C. 593(b), in the belief that judicial appointment is the best way to ensure an "impartial appointment." H.R. Rep. No. 1307, *supra* note 11, at 4. As the Senate Committee on Governmental Affairs explained, "[t]he President and the Attorney General must have policy control to make discretionary enforcement decisions," but "where the alleged criminal conduct of high-level administration officials is involved, this argument must bow to the fundamental principle that no man can be a prosecutor or judge in his own case." S. Rep. No. 170, *supra* p. 10, at 5.

B. The Appointments Cause Permits Judicial Appointment in the Limited Circumstances of the Ethics Act

The direct evidence of the constitutionality of judicial appointment of independent counsel is the text of the Constitution, which provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts

[43] *1977 House Hearing*, *supra* note 11, at 18–23 (Ass't Att'y Gen. Harmon).

of Law, or in the Heads of Departments." Art. II, sec. 2, cl. 2. The challenge to the appointment rests on the view, which the court of appeals adopted, that, notwithstanding its absence from the Clause, a limitation should be read into the constitutional language to restrict courts' authority to make appointments solely to judicial officers. To reach this result the court of appeals concluded, first, that the Framers' intent was narrower than the language they drafted, and, second, that this Court's holding in *Ex Parte Siebold* is narrower than it purported to be. We show below that neither effort to narrow the Clause is supportable. Judicial appointment of independent counsel is fully consistent with the intent of the Framers that appears from the Convention and with this Court's understanding of the Clause in *Siebold*.

1. *The Framers' Intent Supports the Plain Textual Meaning of the Appointments Clause*

The evolution of the Appointments Clause at the Convention supports the clear import of the Clause's text that substantial discretion was given to the Congress to widen the allocation of appointment authority, including by assigning appointment responsibilities to the judiciary. Through most of the Convention, the delegates intended to vest in the Senate the authority to appoint judges, on whom they focused principally.[44] The Convention repeatedly rejected proposals to transfer the authority to appoint judges from the Senate to the executive.[45] The

[44] Edmund Randolph's resolutions to the Convention initially proposed that judges be appointed by the full legislature. *See* 1 *The Records of the Federal Convention of 1787*, at 21-22 (M. Farrand ed. 1966). At Madison's urging, the Convention substituted appointment by the Senate. *Id.* at 232-33.

[45] The Convention defeated motions to transfer appointment to the executive (1) alone, 2 *id.* at 44; (2) by and with the advice and consent of the Senate, *ibid.*, and (3) unless disagreed to by a majority, or by two-thirds, of the Senate, *id.* at 82-83.

The court of appeals' failure to appreciate the Framers' intent to vest appointment authority in the Senate for most of the Convention

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Framers set out to balance Senate appointment of judges with executive authority to appoint "to offices in cases not otherwise provided for." *Id.* at 23. When the Committee of Detail reported a draft of the Constitution on August 6, it retained Senate appointment of Supreme Court judges, added Senate appointment of ambassadors, and provided that the executive should "appoint officers in all cases not otherwise provided for by this Constitution." *Id.* at 185. As the Convention debated the Committee's plan in late August, some delegates objected to any appointments by the Senate,[46] some thought that the legislature should appoint other executive officers as well as ambassadors and judges,[47] and others opposed giving the executive residual authority to appoint all officers not otherwise provided for.[48] The Convention overrode these objections and retained the division between Senate and executive appointment reported by the Committee.

Then, on September 4, when the Committee of Eleven reported to the Convention, it proposed a different plan providing that the President "shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the [United States], whose appointments are not otherwise herein

contributed to its misunderstanding of the Appointments Clause. For example, the court described John Dickinson's proposal to allow appointment authority to be vested in state governments as having been rejected as a "putative encroachment on the President's power." J.S. App. 32a. At the time Dickinson's proposal was rejected, however, the proposed authority to appoint judges and ambassadors was located in the Senate, not the President. *See* 2 Farrand at 389, 406. The proposal was rejected as an encroachment on the federal government, not on the President.

[46] *See, e.g., id.* at 389 (Gouverneur Morris & James Wilson).

[47] *See, e.g., id.* at 329 ("Mr. Dickenson urged that the great appointments should be made by the Legislature, in which case they might properly be consulted by the Executive — but not if made by the Executive himself.").

[48] *Id.* at 405 (Roger Sherman).

provided for." [49] With little discussion, the Convention agreed to the new plan and referred it to the Committee of Style for inclusion in the Constitution.[50] Changing only punctuation, the Committee of Style reported the current language of the first portion of the Appointments Clause to the Convention. *Id.* at 599, 627. Gouverneur Morris then moved to annex to the Clause an alternative mechanism to permit the Congress "by law [to] vest the appointment of such inferior Officers as they think proper, in the President alone, in the Courts of law, or in the heads of Departments." *Id.* at 627. There was only one recorded exchange on the proposal, between Morris and Madison, who saw it as unnecessary.[51] After the vote on the annexation failed by an equal division, "[i]t was urged that it be put a second time, some such provision being too necessary, to be omitted. and on a second question it was agreed to nem. con." *Id.* at 627-28.

The sparse recorded discussion of the addition of the alternative appointment mechanism to the Clause frustrates the attempt to divine an intent other than that conveyed by the text itself. The assumption in which the court of appeals indulged, J.S. App. 33a, that because the alternative language was added near the end of the Convention with little discussion, it lacked sufficient controversy to have been intended to vest the discretion in Congress that it plainly states that it does, is unpersuasive.[52]

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[49] *Id.* at 498-99. This plan was similar to earlier proposals by Madison and Nathaniel Gorham, which the Convention had rejected. *See id.* at 43-44, 80-83.

[50] *Id.* at 539-40, 553. The only change that the Convention made was to add "consuls" to the list of officers. *Id.* at 539.

[51] Madison objected, "It does not go far enough if it be necessary at all — Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." Morris responded, "There is no necessity. Blank Commissions can be sent—." *Ibid.*

[52] The court of appeals attempted to link the alternative mechanism to an unrelated remark by Rufus King. The week before the change was made, George Mason had suggested that officers other than ambassadors be appointed by the President with the concurrence of a

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Only days earlier the Convention had shifted the power to appoint judges and ambassadors from the Senate to the President. *Id.* at 538-39. Notwithstanding the fact that this change concerned the most controversial appointments issue at the Convention and reversed the decision that the delegates had adhered to throughout the Convention, this change, too, generated little recorded discussion. *Ibid.* The reason for the brevity of the discussion on this change is that it was not made on the Convention floor, but was a "compromise . . . effected in [the Committee of Eleven], in which Gouverneur Morris of Pennsylvania represented the larger States and Roger Sherman the smaller States." *Myers*, 272 U.S. at 111.

Then, days later, the Convention annexed to the new appointment provision the alternative appointment mechanism, with little discussion, on a motion made by Morris and seconded by Sherman, 2 Farrand at 627, who had just engineered the appointments compromise between the larger and smaller states. Throughout the Convention Morris had advocated executive appointment. He had unsuccessfully proposed that the Constitution establish a Council of State to advise the President, composed of the Chief Justice of the Supreme Court and secretaries of Domestic Affairs, Commerce and Finance, Foreign Affairs, War, the Marine, and State. *Id.* at 342-43. Morris had contended that the executive should appoint these "min-

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council of senators, rather than the full Senate, because he "considered the Senate as too unwieldy & expensive for appointing officers, especially the smallest, such as tide waiters &c." 2 Farrand at 537-38. Opposing Mason's proposal, King had responded that "[h]e did not suppose it was meant that all the minute officers were to be appointed by the Senate, or any other original source, but by the higher officers of the departments to which they belong." *Id.* at 539. There is no evidence linking this exchange with the subsequent adoption of the alternative appointment mechanism. No delegate was recorded as having shared Mason's concern, and both Morris and Madison, who spoke on the subsequent change, appear to have held King's view that the first portion of the Clause was not intended to bar delegating the appointment of low-level officers. *Id.* at 627.

isterial officers for the administration of public affairs," whom he called "great officers of State." [53]

Sherman, on the other hand, had opposed universal executive appointment. He had "admitted it to be proper that many officers in the Executive Department should be so appointed — but contended that many ought not, as general officers in the Army in time of peace &c. Herein lay the corruption in G. Britain." *Id.* at 405. Sherman had proposed, also unsuccessfully, that Congress be authorized to provide by law for appointment otherwise than by the President.[54] Thus, the alternative appointment mechanism brought together delegates who were at opposite poles of thought on the appointment of executive officers. The alternative mechanism served the goals of delegates from large states represented by Morris because it permitted the vesting of appointment authority "in the President alone," which they preferred to Senate confirmation. By authorizing Congress to enact legislation vesting appointing authority of executive officers in "the Courts of Law, or . . . the Heads of Departments," it also served the goals of Sherman's followers from small states because it gave Congress some of the appointments flexibility that they had sought. Neither Morris's nor Sherman's proposal had been adopted by the Convention earlier, when authority to appoint judges and ambassadors had been vested in the Senate and authority to appoint other officers in the President. However, once the Convention had decided that officers in both categories would be appointed by the President with Senate confirmation, the delegates agreed to permit Congress to provide by law

[53] *Id.* at 32, 33. Morris also favored executive appointment of judges. *Ibid.* He "argued agst. the appointment of officers by the Senate. He considered the body as too numerous for the purpose; as subject to cabal; and as devoid of responsibility." *Id.* at 389.

[54] Sherman had moved that the words "or by law" be added at the end of the sentence providing that the President "shall appoint officers in all cases not otherwise provided for by this Constitution." *Ibid.*

for alternative appointment methods that excluded both the President and the Senate.[55]

The breadth of the alternative appointment mechanism attracted favorable public attention during the ratification debates. The leading Anti-Federalist pamphlets during ratification, circulated under the name *Letters from the Federal Farmer*, specifically addressed the flexibility that the alternative mechanism gave to Congress to shift the power of appointment "by placing many of the inferior appointments in the courts of law, and heads of departments." [56] The pamphlet explained that "[t]his power of distributing appointments, as circumstances may require, into several hands, in a well formed disinterested legislature, might be of essential service, not only in promoting beneficial appointments, but, also, in preserving the balance in government." *Ibid.* Thus, the Appointments Clause was understood when the Constitution was ratified to authorize Congress to vest appointment authority in the courts when necessary "in preserving the balance in government."

2. *This Court's Decision in Ex Parte Siebold Provides Firm Support for Court Appointment of Independent Counsel*

a. The Election Supervisors in Siebold Enforced the Law

This Court has previously held that the alternative mechanism in the Appointments Clause empowers Congress to vest authority to appoint executive officers in the courts. *Ex Parte Siebold*, 100 U.S. 371, presented a challenge by defendants convicted of violating the federal En-

[55] This amendment may have been more attractive than Sherman's original proposal because, by limiting alternative means of appointment to the President, the Courts, and Heads of Departments, it barred other appointing entities, such as Congress or state governments, which the Convention opposed. *See id.* at 406.

[56] Letters from the Federal Farmer to the Republican, No. 14, Jan. 17, 1788, *reprinted in* 4 *The Founders' Constitution* 98 (P. Kurland & R. Lerner eds. 1987).

forcement Acts, which were enacted during Reconstruction to enforce civil voting rights in federal elections.[57] To enforce the Fifteenth Amendment and prevent fraud in congressional elections, the Acts created federal "supervisors of election" to police voter registration, balloting, and vote counting.[58] Congress vested the authority to appoint the election supervisors in federal circuit judges in circuits where residents had expressed "their desire to have such registration or election guarded and scrutinized." [59]

The defendants in *Siebold* had been convicted of violating provisions of the Acts making it unlawful for state election officials to engage in election fraud in violation of state or federal law or for anyone to interfere with the federal election supervisors in the performance of their duties.[60] They challenged the Acts' constitutionality on the grounds (1) that Congress could not regulate elections by supplementing state laws with federal penalties, and (2) that interference with the federal supervisors could not be punished, because the supervisors had been appointed improperly by the courts.

On their second point of challenge, the defendants contended that the supervisors' duties were "entirely executive in their character" and "that no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department of the government." 100 U.S. at 397. The Court rejected the claim and relied on the alternative mechanism in the Appointments Clause to hold that "Congress had the power to vest the appointment of the supervisors in question in the circuit courts." *Id.* at 398. The Court

[57] Act of May 31, 1870, ch. 114, 16 Stat. 140–46; Act of July 14, 1870, ch. 254, § 5, 16 Stat. 254, 255–56, *as amended by* Act of Feb. 28, 1871, ch. 99, 16 Stat. 433–40.

[58] Act of Feb. 28, 1871, §§ 2, 4–5, 16 Stat. 433–35, *quoted in Siebold*, 100 U.S. at 379–80.

[59] *Id.*, § 2, 16 Stat. 433–34, *quoted in Siebold*, 100 U.S. at 379.

[60] *Id.*, § 10, 16 Stat. 436–37, *quoted in Siebold*, 100 U.S. at 381; Act of May 31, 1870, § 22, 16 Stat. 145–46.

explained that, although "[i]t is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain, . . . *there is no absolute requirement to this effect in the Constitution.*" *Id.* at 397 (emphasis added).

Instead of absolutely prohibiting "cross-branch" appointments, the Court adopted a more flexible and subtle approach. It held that generally "the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress." *Id.* at 397–98.[61] Congress's exercise of discretion, the Court held, may be vitiated by the courts only if Congress's selection entails "such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void." 100 U.S. at 398. The Court found no "incongruity" in the courts' appointing election supervisors, because,

> It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither

[61] The "functionaries" the Court was referring to are the entities named in the alternative mechanism in the Appointments Clause: the President, the Courts of Law, and the Heads of Departments. Underlying the Court's ruling was its view that "if there were" a per se rule, "it would be difficult in many cases to determine to which department an office properly belonged," citing marshals as one example. *Id.* at 397. The Court suggested that the Framers had eschewed requiring such determinations to spare "harrass[ment] by the endless controversies to which a more specific direction on this subject might have given rise." *Id.* at 398. Justice Story earlier made the same point that "[t]he propriety of this discretionary power in congress, to some extent, cannot well be questioned. If any discretion should be allowed, its limits could hardly admit of being exactly defined; and it might fairly be left to congress to act according to the lights of experience." J. Story, *Commentaries on the Constitution of the United States*, § 793, at 566 (reprinted ed. 1987).

> the President, nor any head of department, could have been equally competent to the task.

Ibid.

The court of appeals erroneously dismissed *Siebold* based upon its misperception of the duties of the election supervisors whose appointments the Court upheld there. The court of appeals persuaded itself that the officers were merely election observers and identified the Enforcement Acts as an exercise of Congress's power to judge the elections of its members.[62] Because Congress had vested authority in the courts to appoint only "officials charged with tasks the Constitution assigns to Congress itself," the court reasoned, "Congress presumably could have chosen any method of appointing such officials, including vesting the appointment power in itself." J.S. App. 36a-37a.

In its effort to dispose of *Siebold*, the court of appeals dramatically rewrote the history of the nation's struggle during Reconstruction for voting rights. The Enforcement Acts were precisely what their titles suggest: laws to *enforce* the right to vote guaranteed by the Constitution. Congress established election supervisors to do precisely what their titles suggest: to *supervise* elections to safeguard the right to vote. As part of their duties, the supervisors were charged with superintending all aspects of the voter registration process. They were directed "to attend at all times and places fixed for the registration of voters . . . and to challenge any person offering to register; to attend at all times and places when the names of registered voters may be marked for challenge, and to cause such names registered as they shall deem proper to be so marked," to "cause the names of those upon any such list whose right to register or vote shall be honestly doubted to be verified by proper inquiry and examination at the respective places by them assigned as their residences," to "prevent fraudulent registration," and "to

[62] "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members." Art. I, sec. 5, cl. 1.

personally inspect and scrutinize such registry" to "detect and expose the improper or wrongful removal therefrom, or addition thereto, in any way, of any name or names." [63] In short, the federal supervisors were assigned the duties routinely performed by a registrar of voters.[64] The supervisors' enforcement role during balloting was equally explicit. They were charged

> to attend at all times and places for holding elections . . . and for counting the votes cast at said elections; to challenge any vote offered by any person whose legal qualifications the supervisors, or either of them, shall doubt; . . . to personally inspect and scrutinize . . . the manner in which the voting is done, and the way and method in which the poll-books, registry-lists, and tallies or check-books . . . are kept; . . . to personally scrutinize, count, and canvass each and every ballot; . . . [and to] prevent . . . fraudulent voting . . . or fraudulent conduct on the part of any officer of election.[65]

Congress had no doubt when it enacted the Enforcement Acts about the role it intended the federal supervisors to play in the electoral process. The central legislative determination underlying the enactments was that direct federal supervision over the electoral process was necessary to enforce the right to vote guaranteed by the Fifteenth Amendment. Based on documented voting abuses in much of the country,[66] the Congress concluded

[63] Act of Feb. 28, 1871, §§ 4, 8, 13, 16 Stat. 434, 436, 438.

[64] *Cf.* 42 U.S.C. 1973d-1973e (duties of federal voting examiners under Voting Rights Act of 1965).

[65] Act of Feb. 28, 1871, §§ 5, 8, 16 Stat. 434-35, 436. The Act, to be sure, also directed the supervisors to report, through chief supervisors, to Congress on any interference with the performance of their duties. *Id.*, § 7, 16 Stat. 435-36. This reporting responsibility does not mean that the supervisors were mere observers but represents Congress's determination to ensure that the supervisors' enforcement was not disrupted.

[66] The outrages that led to the Enforcement Acts are described in A. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* 383-87 (1971).

that "the State laws have not protected the citizens of the southern States against violence, and have not protected the citizens against fraud and force and wrong in more than one of the cities of the northern States." Cong. Globe, 41st Cong., 3d Sess. 1276 (1871) (Rep. Churchill). Congress enacted the Enforcement Acts to fulfill its "highest duty . . . to intervene and protect the citizens of the United States in the enjoyment of the elective franchise against force and fraud." *Ibid.*

A key element of Congress's program was the federal supervisors, whose mission was to "participate in conducting the election, simply to the end that there may be fair play and the enjoyment of equal rights under the laws of the State." *Id.* at 1284 (Rep. Bingham). Opposition to the legislation focused on the active enforcement role of the election supervisors. Representative Eldridge objected that it permitted the federal government, through the supervisors and auxiliary officers, to "take possession of the registration as well as the elections of the States, determine who is qualified and who not qualified, who shall and who shall not register, to the exclusion of all State authority." *Id.* at 1272. Opposition in the Senate was similarly based on the law's authorization of the federal supervisors "to interfere directly in the elections," *id.* at 1651 (Sen. Casserly), and to "assume[] the power of the General Government to superintend and regulate registrations and elections." *Id.* at 1633 (Sen. Vickers). The legislative history leaves no doubt that it was the purpose of the Enforcement Acts to give federal supervisors "powers over the ballots of the people who are to vote." *Id.* at 1642–43 (Sen. Hill).

The extensive enforcement role actually performed by the federal supervisors is similarly well-documented. In the election of 1876, for example, in New York City, the supervisors assembled voter registration lists and "went from house to house with the lists, for the age of a voter, his residence, and other matters, so as to identify him and estop fraud. . . . When all the reports agreed that

the man did not live at the place, . . . arrests were ordered." H.R. Rep. No. 218, 44th Cong., 2d Sess. 3 (1877). A House committee studying the efficacy of the federal supervisors concluded,

> More care could not have been taken . . . for the verification of the registry and the purity of the election. . . . From the moment the supervisors are appointed, from the moment that the lists are purged, from the moment that the applications are examined, to the very last return of the popular expression, this election shows the calm mastery of prudence.[67]

Nor can there be any doubt about this Court's understanding of the federal supervisors' responsibility "for superintending the election," *Siebold*, 100 U.S. at 386, and not merely observing it. The Court appreciated that the supervisors were a "means of supervision in order more effectually to secure [state officers'] performance" of their duties. *Id.* at 388. Justice Field described the supervisors' duty as "to supervise the action of the State officers from the registration of voters down to the close of the polls on the day of election." [68]

In straining to construe the election supervisors as observers whose duties "Congress might delegate to one of its own committees," J.A. App. 37a, the court of appeals overlooked the main point of the controversy in *Siebold*. In addition to their Appointments Clause claim, the defendants had argued that Congress cannot regulate elections jointly with states, but must regulate them exclusively or not at all. The Court rejected this claim based on its interpretation of Art. I, sec. 4, cl. 1, which delegates

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[67] *Id.* at 4–5. The Enforcement Acts were less successful in the South. *See* Swinney, *Enforcing the Fifteenth Amendment, 1870–1877*, 28 J. S. Hist. 202 (1962).

[68] *Ex Parte Clarke*, 100 U.S. 399, 407 (1880) (Field, J., dissenting) (companion case). Justice Field dissented precisely because of his belief "that it is not competent for Congress . . . to subject [a State officer] in the performance of [his] duties to the supervision and control of others." *Id.* at 408.

to Congress power "by Law [to] make or alter [States'] Regulations" for "[t]he Time, Places and Manner of holding Elections for Senators and Representatives." *See Siebold*, 100 U.S. at 383. The Court unquestionably believed that Congress's power to regulate elections under Art. I, sec. 4 was the constitutional underpinning for the enactments.[69] Thus, when this Court decided *Siebold*, it fully appreciated that Congress was regulating the conduct of elections and that it had created federal supervisors to execute the regulations. It is simply not credible to maintain the contrary.

b. Independent Counsel Meet This Court's Test for Judicial Appointment

Siebold, therefore, provides strong support for judicial appointment of independent counsel. As in *Siebold*, appointment by the courts is not "incongruous" because the task of appointing counsel could not "with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it." 100 U.S. at 398. Given the statute's central purpose of relieving conflicts of interest in the executive branch, it would be "plainly incongruous to ask the Executive to appoint a prosecutor charged with the duty of investigating the appointing authority." [70] Thus, for independent counsel, more certainly

[69] Contrary to the court of appeals' suggestion, this Court did not merely note Congress's power to regulate elections somehow in passing. J.S. App. 36a n.27, but based its decision upholding the Acts on a detailed consideration of Art. I, sec. 4. 100 U.S. at 383-88. Further, the legislative history of the Acts is replete with evidence that Congress acted pursuant to Art. I, sec. 4 and the 15th Amendment. *See, e.g.*, Cong. Globe, 41st Cong., 3d Sess. 1276, 1280, 1283 (1871). There is no support for the court of appeals' claim that *Siebold* concerned Congress's power to judge its members' elections under Art. I, sec. 5, cl. 1. As *Buckley* v. *Valeo*, 424 U.S. 1, 133 (1976), subsequently made clear, Art. I, sec. 5 does not even confer "a general legislative power," but a "judicial" power; therefore, "[w]hatever power Congress may have to legislate . . . must derive from § 4, rather than § 5, of Art. I."

[70] *1973 Senate Hearings*, *supra* note 2, Pt. 2, at 558 (Prof. Heymann & Breyer).

than for the election supervisors in *Siebold*. "[n]either the President, nor any head of department, could have been equally competent to the task." 100 U.S. at 398.

The lack of "incongruity" in court appointment is also far plainer, compared to election supervisors, by reason of the courts' affinity with the duties of independent counsel. Prosecutors share the dual nature of the marshal cited by the Court in *Siebold*: each "is an executive officer, when appointment, in ordinary cases, is left to the President and Senate," but each also "is pre-eminently the officer of the courts." *Id.* at 397. Unlike election supervisors, whose duties had "nothing to do with the judicial process," "the functions [an independent counsel] is charged to perform are so closely connected with the judicial functions" [71] that "[t]he courts are entirely familiar with the qualities that make a good prosecutor." [72] Under *Siebold* the courts are uniquely well-situated to appoint independent counsel for reasons of both their knowledge of counsels' functions and the relative disability of alternative modes of appointment.

The Congress has used its Appointments Clause power to vest in the courts authority to appoint officers other than pure judicial officers very sparingly. This infrequency reflects Congress's agreement as a matter of policy that "[i]t is no doubt usual and proper to vest the appointment of inferior officers in that department of the government . . . to which the duties of such officers appertain." *Siebold*, 100 U.S. at 397. Occasionally, however, exceptional circumstances occur, as they did during Reconstruction and they have in the Ethics Act, warranting judicial appointment. In such circumstances, unless Congress has designated an "incongruous" means of appointment, the Constitution commands respect for Congress's determination.

[71] *1973 Senate Hearings*, *supra* note 2, Pt. 1, at 321, 322 (Prof. Philip Kurland).

[72] *Id.*, Pt. 2, at 557 (Prof. Breyer & Heymann).

Finally, *Siebold*'s "incongruity" standard is consistent with the Court's guidance that "in determining whether [a statute] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *GSA*, 433 U.S. at 443. On the appointment side as with removal, Congress has carefully sought to minimize intrusion into the executive branch. First, the statute narrowly focuses the reach of court appointment solely on cases of executive conflicts of interest. Broader-based attempts to authorize judicial appointment of executive officers — whether of the nation's principal law enforcement officials, such as the Attorney General, or of officers with responsibilities in areas such as agricultural policy, foreign affairs, or war, *see* J.S. App. 39a — could threaten, in contrast to the Ethics Act, to "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." 433 U.S. at 443.

Second, the Act gives the executive, through the Attorney General, sole authority to determine according to law when allegations of criminal misconduct are serious enough to create the need to trigger the judicial appointment power. In the absence of enabling action by the Attorney General, the court is powerless to make an appointment. 28 U.S.C. 592(b)(1), 593(b). Thus, Congress has delegated to the courts only the single act of selecting an impartial, capable attorney to supervise an independent investigation. Vesting solely that power of selection in the courts in order to guarantee impartiality and ensure public confidence in no way "prevents the Executive Branch from accomplishing its constitutionally assigned functions." 433 U.S. at 443.

CONCLUSION

The constitutionality of the independent counsel law should be sustained.

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